

MOTOR MONDAY



Monday, September 13, 2021

MARIJUANA DUI AFTER PROP 207

Presented by:

Jared Johnson

Prop 207 TSRP

City of Scottsdale and

The Arizona Governor's Office of Highway Safety

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

3838 N. Central Ave., Suite 850

Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ

EXECUTIVE DIRECTOR



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Prop 207

- Went into effect November 30th, 2020
- NOT RETROACTIVE
 - A.R.S. § 1-244 – Statute must explicitly state it is retroactive
 - Prop 207 is silent, therefore not retroactive
- Allows possession and use of MJ 21+
- Civil and possible criminal penalties for those under 21

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§ 28-1381(A)(3)

- Unlike most prop 207 protections, DUI changes are NOT limited to 21+
 - “Notwithstanding any other law, a person with metabolites or components of marijuana in the person’s body is guilty of violating section 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree”

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§ 28-1381(A)(3)

- Unlike most prop 207 protections, DUI changes are NOT limited to 21+
 - “Notwithstanding any other law, a person with metabolites or components of marijuana in the person’s body is guilty of violating section 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree”
- END OF THE (A)(3)?

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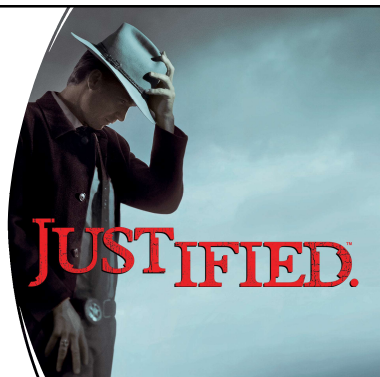
§ 28-1381(A)(3)

- Medical Marijuana defense is dead
- Still some uncertainty about whether Prop 207 adds an additional element (impairment) or whether it is an affirmative defense

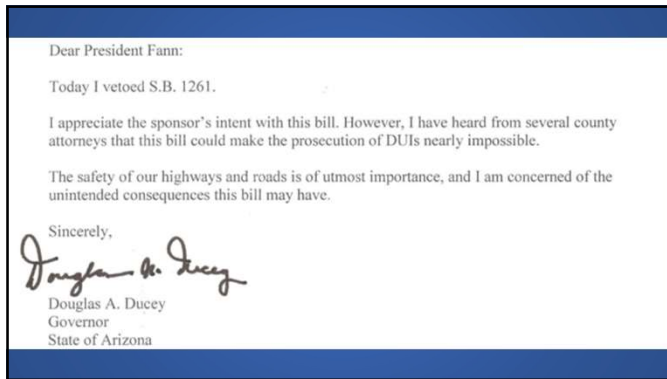
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Justification

- SB 1261
- Vetoed by Governor Ducey on April 26, 2021
- Rosenstein Law Firm



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Reasonable Suspicion

- A.R.S. § 36-2852
 - (C) Notwithstanding any other law, the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime. This subsection **does not apply** when a law enforcement officer is investigating whether a person has violated section 28-1381.

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Reasonable Suspicion

- A.R.S. § 36-2851(8)
 - Does not allow any person to: (a) Smoke marijuana in a public place or open space. (b) Consume marijuana or marijuana products while driving, operating or riding in the passenger seat or compartment of an operating motor vehicle, boat, vessel, aircraft or another vehicle used for transportation.

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- Open Space
 - A.R.S. § 36-2850(22) – a public park, public sidewalk, public walkway or public pedestrian thoroughfare

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Reasonable Suspicion

- Public Place
 - Same meaning prescribed in the smoke-free Arizona Act 36-601.01
 - "Public place" means any enclosed area to which the public is invited or in which the public is permitted, including airports, banks, bars, common areas of apartment buildings, condominiums or other multifamily housing facilities, educational facilities, entertainment facilities or venues, health care facilities, hotel and motel common areas, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports facilities, theaters, and waiting rooms. A private residence is not a "public place" unless it is used as a child care, adult day care, or health care facility.

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Reasonable Suspicion

- Fresh vs. burnt

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Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an “operating” vehicle

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Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an “operating” vehicle
- A.R.S. 28-101(22)
 - Drive – “means to operate or be in actual physical control of a motor vehicle”

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Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an “operating” vehicle
- A.R.S. 28-101(22)
 - Drive – “means to operate or be in actual physical control of a motor vehicle”
- Parked Car Problem
 - Most parking lots are arguable not “enclosed”
 - Parked car is not being operated

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Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an "operating" vehicle
- A.R.S. 28-101(22)
 - Drive – "means to operate or be in actual physical control of a motor vehicle"
- Parked Car Problem
 - Most parking lots are arguable not "enclosed"
 - Parked car is not being operated
 - If stuck, check the city code

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Reasonable Suspicion

- A.R.S. § 22-701
 - Gives officers authority to stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of a civil marijuana offense and to serve a copy of the complaint.

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Why nanograms don't matter

- No direct correlation between active THC and impairment

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- No direct correlation between active THC and impairment
- THC peaks within minutes of ingestion (if smoked)



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- No direct correlation between active THC and impairment
- THC peaks within minutes of ingestion (if smoked)
- Peak impairment occurs 40 minutes or more after smoking



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Why nanograms don't matter

- Arizona has no per se for THC (CO 5ng)



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Why nanograms don't matter

- Arizona has no per se for THC (CO 5ng)
- Prop 207 prohibits AZ from adopting a per se standard



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Why nanograms don't matter

- Arizona has no per se for THC (CO 5ng)
- Prop 207 prohibits AZ from adopting a per se standard
- NHTSA is not likely to recommend a per se standard anytime soon



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Why not adopting a per se standard can be a good thing

- Consistent with the science

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- Consistent with the science
- Cases where THC is below threshold but significant impairment

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Why not adopting a per se standard can be a good thing

- Consistent with the science
- Cases where THC is below threshold but significant impairment observed
- Allows us limit arguing the nanograms

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Why not adopting a per se standard can be a good thing

- Consistent with the science
- Cases where THC is below threshold but significant impairment observed
- Allows us to limit arguing the nanograms
 - No scientific basis to correlate results to impairment
 - Removes juror confusion
 - Avoids outside influence
 - Prevents defense from soliciting improper testimony and making improper argument about what the nanogram results mean

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When nanograms do matter

- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)



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- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)
- Carboxy-THC not impairing



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- Can remain in system up to a month



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When nanograms do matter

- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)
- Carboxy-THC not impairing
- Can remain in system up to a month
- Therefore not evidence of recent use



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When nanograms do matter

- Lab threshold
 - Each lab is different



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When nanograms do matter

- Lab threshold
 - Each lab is different
 - If it detects THC but below threshold won't report THC quantitative results



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When nanograms do matter

- Lab threshold
 - Each lab is different
 - If it detects THC but below threshold won't report THC quantitative results
 - Without active THC we fail under both A(1) and A(3)



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Demonstrating Impairment

- SFSTs are crucial



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Demonstrating Impairment

- SFSTs are crucial
- Standardized vs. validated



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Demonstrating Impairment

- SFSTs are crucial
- Standardized vs. validated
- Bodycams



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Demonstrating Impairment

- Modified Romberg



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Demonstrating Impairment

- Modified Romberg
- Finger to Nose



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Attacks on HGN

- Yes it was validated on ETOH



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Attacks on HGN

- Yes it was validated on ETOH
- But validated to show impairment



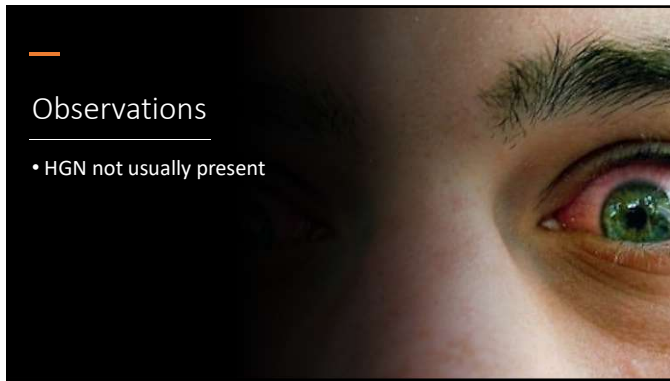
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Attacks on HGN & SFST

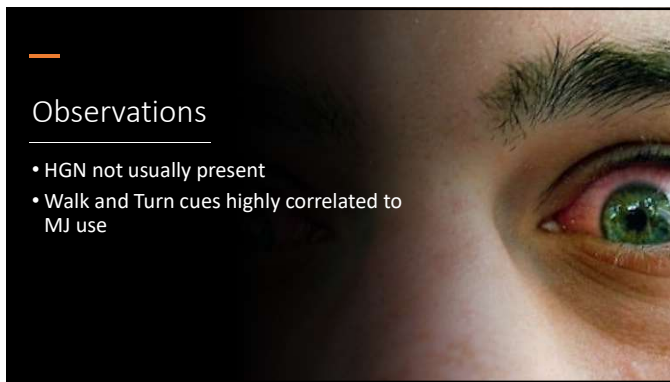
- Yes HGN was validated on ETOH
- But validated to show impairment
- SFSTs were included in the DRE studies and validated for 7 drug categories.



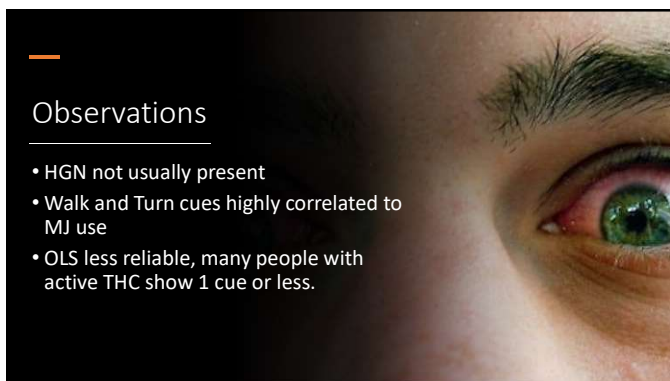
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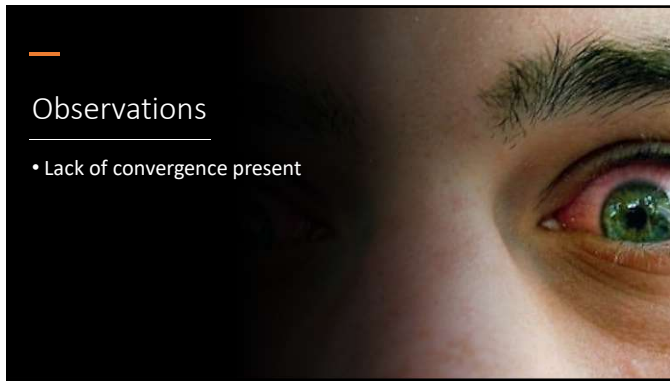
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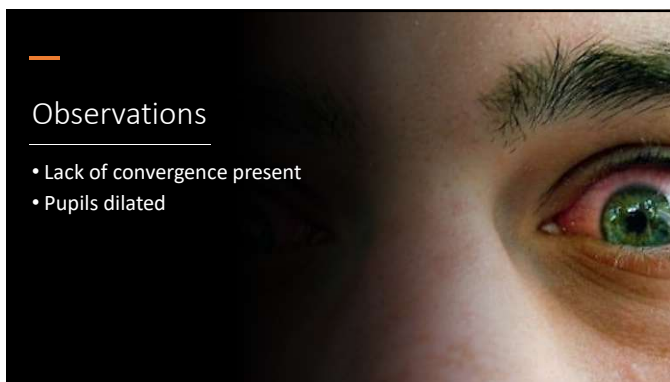
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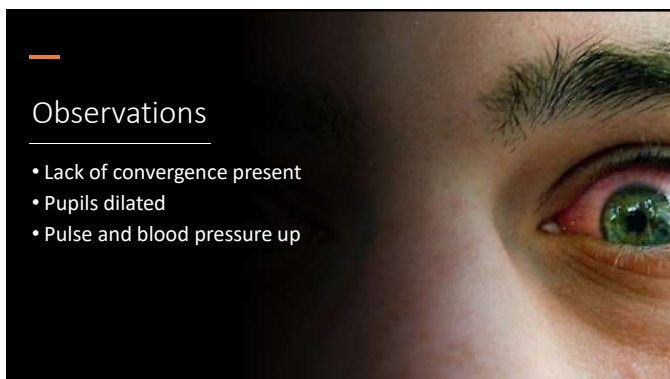
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Observations

- What you won't see
 - HGN and VGN (usually)
 - Changes in reaction to light
 - Changes in body temperature



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Cannabis Studies

- *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment*, Rebecca L. Hartman, et al (July 2016)



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Cannabis Studies

- *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment*, Rebecca L. Hartman, et al (July 2016)
- Results – Finger to nose with over three misses is the best indicator! Eyelid tremors alone an 86.1% predictor.



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Cannabis Studies

- Recommended FST's for cannabis Impairment
- FTN with three or more misses
- Eyelid tremors present
- OLS sway
- WAT 2 cues
- 2 of the 4 or more equals impairment



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Cannabis Studies

- *Cannabis Effects on Driving Skills*, Hartman, Huestis et.al., Clinical Chemistry (2013)
- *Cannabis increases risk of accidents taken alone and combining alcohol with cannabis strongly enhances impairment, especially lane weaving.*



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Drug Recognition Expert (DRE)

- DRE trained officers have been on the decline



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- New emphasis on DRE officers for MJ



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Drug Recognition Expert (DRE)

- DRE trained officers have been on the decline
- New emphasis on DRE officers for MJ
- DUI Training
 - Academy
 - HGN
 - ARIDE
 - DRE
 - DRE Instructor



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Drug Recognition Expert (DRE)

- "A process of systematically examining a person suspected of being under the influence of a drug, for the purpose of ascertaining what category of drugs (or combination of categories) is causing that person's impairment. A trained DRE can identify, with a high degree of reliability, the distinguishing signs and symptoms of seven broad categories of drugs."



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Drug Recognition Expert (DRE)

- DRE Officers are Experts



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Drug Recognition Expert (DRE)

- DRE Officers are Experts
- If you are getting resistance from the judge qualifying your DRE as an expert, you should rely on the big three studies



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Drug Recognition Expert (DRE)

- #1 John Hopkins Study (Bigelow) 1985
- NHTSA evaluated the LAPD preliminary DRE program
- Given 15 minutes, the trained DRE had to determine if a person was impaired by drugs and the category
- DRE's were found to be over 90% accurate



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Drug Recognition Expert (DRE)

- #2 173 Case Study 1985
- NHTSA field validation study of LAPD
- 94% of the time an arrest was made using DRE techniques a drug other than alcohol was detected by lab analysis



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Drug Recognition Expert (DRE)

- #3 The Arizona Study
- 1994 DRE validation study
- Validated the Reliability of the DRE examinations
- Contains good statistics regarding the detection of drivers using marijuana/cannabis



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DRE Uses

- Fact Witness
 - Did a DRE or some portion of the investigation
- Cold Expert
 - They can be called to educate your jury
- Expert Opinion
 - Can they testify as to an opinion on impairment? See Rule 702



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DRE Expert Opinion

Rule 704:

- (a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.



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DRE Expert Opinion

Rule 704:

- (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a **mental state or condition** that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.



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DRE Expert Opinion

Fuenning 139 Ariz. 590

- Frequently misused
- Most language cited by defense in *dicta*
- This case and *Bedoni* (161 Ariz. 480) both support eliciting DRE testimony that Defendant's conduct appeared influenced by drugs.



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DRE Expert Opinion

Fuenning 139 Ariz. 590

- Limit appears to be “influenced by”.
- Asking about whether the Defendant was “impaired” may get you sustained objection or worse, a mistrial.



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DRE Uses

- Meet with your DRE ahead of time



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DRE Uses

- Meet with your DRE ahead of time
- Have them educate you



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DRE Uses

- Meet with your DRE ahead of time
- Have them educate you
- Even if you don't entirely understand the DRE or its significance, make sure you know what questions to ask, your DRE will help you



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How to overcome challenges

- Emphasize signs of impairment

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 - Don't just tell, show if you can
 - Bad driving is the best evidence

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Chris Rock Rule

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How to overcome challenges

- Emphasize signs of impairment
 - Don't just tell, show if you can
 - Bad driving is the best evidence

Chris Rock Rule

- Don't let the defense take credit for something defendant was supposed to do

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How to overcome challenges

- Build your evidence in closing
 - If defendant didn't show these signs would officer have conducted a DUI investigation
 - What about DUI investigation made officer decide to arrest
 - What about DRE led officers to believe defendant was under influence of MJ
 - Finally, did labs confirm officers were right?
- In short, don't let them divide and conquer your evidence

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How to overcome challenges

- Jury Selection
 - Most of your jurors are going to have an opinion on MJ

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 - It is your job to discover it

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How to overcome challenges

- Jury Selection
 - Most of your jurors are going to have an opinion on MJ
 - It is your job to discover it
 - Get every juror to talk, the silent juror is the one who will ruin your verdict
 - Questions like "do you believe that marijuana use can impair a person's ability to drive?"

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Changes to Preemptory Strikes

Things to be aware of

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Jury Selection Changes

- **Rule 18.4. Challenges**
- [No change]
- **Challenge for Cause.** ~~On motion or on its own, the court must~~ The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

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Jury Selection Changes

- **Rule 18.5. Procedure for Jury Selection**
- [No change]
- **Calling Jurors for Examination.** The court may call to the jury box a number of prospective jurors equal to the number to serve plus the number of alternates ~~plus the number of preemptory challenges that the parties are permitted.~~ Alternatively, and at the court's discretion, all members of the panel may be examined.

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Jury Selection Changes

- **(f) Challenge for Cause.** Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. If the court grants a challenge for cause, it must excuse the affected prospective juror. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel. All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.
- (g) The parties may stipulate to the removal of a juror.

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Jury Selection Changes – Letter from AOC

By eliminating peremptory juror strikes, trial judges will need to ensure that litigators have time to develop and make appropriate arguments for removing jurors for cause. The Administrative Office of the Courts will develop training for judges on trial management to successfully implement the changes. Although a small percentage of cases proceed to a jury trial, the superior court in Arizona alone conducts approximately 600 criminal jury trials each year.

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Jared Johnson
Prop 207 TSRP
City of
Scottsdale

jjohnson@scottsdaleaz.gov
480-312-3164

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